THE JUDICIAL SYSTEM OF SOUTH AFRICA.

For judicial purposes South Africa may be said to include the Union of South Africa (consisting of the Cape of Good Hope, Natal, Orange Free State and Transvaal Provinces) and the separate colony of Southern Rhodesia. With the exception of the native protectorates, which are under Imperial administration and where, as a rule, native laws and customs are in force, the common law of South Africa from Cape Point to the Zambesi is the Roman-Dutch law as it was at the time of the annexation of the Cape in 1806, modified by local judicial decisions and statutes. Of this body of law, which was first introduced into South Africa by the Dutch settlers at the Cape in the sixteenth century, Lord De Villiers, C. J., has said:[1]

> "They are not to be found in any code or authentic document to which easy reference can be made, and it is often only through a judicial decision upon a disputed question of law that the Legislature becomes aware of the existence of a particular law. The conclusion at which I have arrived as to the obligatory nature of the body of laws in force in this Colony, at the date of the British occupation in 1806, may be briefly stated. The presumption is that every one of these laws, if not repealed by the local Legislature, is still in force. This presumption will not, however, prevail in regard to any rule of law which is inconsistent with South African usages. The best proof of such usage is furnished by unoverruled judicial decisions. In the absence of such decisions the Court may take judicial notice of any general custom which is not only well established but reasonable in itself. Any Dutch law which is inconsistent with such well established and reasonable custom, and has not, although relating to matters of frequent occurrence, been distinctly recognized and acted upon by the Supreme Court, may fairly be held to have been abrogated by disuse."

This *dictum* has been characterized as "a bold decision," but it may be regarded as authoritative, and may serve to indicate the difficulties of administering the law and the important discretion which the judges have in declaring it. The bulk of

[1] Seaville v. Colley, 9 Jura's Supreme Court Reports at page 44.

the law is contained in the writings, in Latin or Dutch, of authorities such as Voet and Grotius, and in the placaats or statutes passed in Holland mainly about the time of the Reformation. Occasionally the legal and lay world is startled by the unearthing, by a too learned judge, of some long-forgotten placaat or manuscript, and the hand of the clock of justice is put back accordingly. The legislature becomes aware, but does nothing. Such antiquarian escapades, however, though disconcerting, are fortunately rare, and the judges have held the telescope to their blind eye, generally preferring to administer justice in accordance with modern ideas, to a pedantic adherence to the letter of the written law of mediaeval Holland. The doctrine of *stare decisis,* on the whole, prevails, and thus by a steady stream of decisions, the law which is as flexible as the English law, has been moulded into a more modern form. The basis of the law is the civil law and Germanic customs. In the reported cases, Story occupies an honorable place with Pothier and the Roman-Dutch writers such as, Grotius, Voet, Van Der Linden and Van Leeuwerf. The general law is much akin to that of Scotland. In the early reports, references to Scottish authorities are frequent. The influence of the English law is due to the frequent citation of English text-writers and reports, especially the reports of the Privy Council which are binding.

The statute law has been largely taken from that of England. The law of crimes, contract, tort, evidence and insurance differs little from that of England and America. The marriage law favors the liberty and equality of spouses more than that of England. The Deeds Registry, imported from Holland, facilitates business. There is no Statute of Frauds, except in Natal, though in the Transvaal Orange Free State agreements for the sale of fixed property must be in writing signed by the parties or their agents. There is no law of primogeniture or any remnant of the feudal system in the law of property.

The highest court is the Appellate Division of the Supreme Court of South Africa, which is the final court of appeal for the Union and Southern Rhodesia. There is, however, a right of appeal from the decisions of this court to the Judicial Committee

of the Privy Council on leave being given by that Committee, a right which has not been exercised since the Union in 1910. The Appellate Division is a strong court consisting of a chief justice and two ordinary judges of appeal, who, when not occupied in this Division, pursue their ordinary duties in a Local or Provincial Division. Southern Rhodesia is not represented on the bench of this court, though there is nothing to prevent one of its judges being appointed, if so desired. On the hearing of appeals from a court consisting of two or more judges, five judges of appeal form a quorum; but in appeals from a single judge, the quorum is three. Appeals may be made from any divisional court, except from orders made on motion or as to costs, where, however, an appeal lies by consent of parties. In criminal matters there is no appeal from the finding of a jury, but only on legal points or irregularities appearing in the procedure or on the record. The Appellate Division also hears appeals from the Native High Court of Natal. The process of this court extends and is executable throughout the Union. Upon this court devolves the important work of unifying the divergent decisions of the various provinces, so far as such unification is possible by a non-legislative body. This is generally regarded as one of its most important functions and in one case a long series of Natal decisions was upset and an old Cape decision followed which was regarded as being more in conformity with the old text-writers. With the exception of a few consolidating statutes dealing mainly with administration, the legislature, since the Union, has shirked the essential duty of codification. The administration of justice in South Africa is more uniform than its law, and is largely based upon that of England with a few important modifications. This uniformity is due to the fact that the Cape system has spread to the remaining parts of South Africa.

Civil Jurisdiction.

The inferior courts are those of magistrates, known in Southern Rhodesia as resident magistrates. The magistrate is generally at the same time a fiscal official known as the civil commissioner. He is a civil servant, his only legal qualification as a

rule being that he must have passed an examination on the elements of law equivalent to the attorney's examination (for the more important appointments an examination equivalent to the degree of Bachelor of Laws is a recommendation, but is not essential). Only occasionally is a legal practitioner appointed to this post. Magistrates generally receive their appointments according to seniority; and a man who has spent years in a financial department, may find himself called upon to administer, as a magistrate, an abstruse and complicated system of law, aided by an inadequate library. The only solution is codification and the appointment of magistrates who have had an adequate legal or judicial training. The magistrate resides in his district, and holds his court, which is a court of record, at the principal town and a periodical court in outlying parts of his district. In some of the larger towns there are several magistrates.

The magistrate's jurisdiction is limited by the amount sued for, varying in the different provinces and colonies, and not exceeding two hundred and fifty pounds in illiquid and five hundred pounds in liquid cases. Within this limit the magistrate has jurisdiction in all causes except where the validity of a will or the title to land, tenements, fees, duties or offices is in question, or whereby rights in future can be bound (*e. g.,* matrimonial rights). As a rule he cannot grant specific performance. Duties corresponding to those of the sheriff are exercised by the messenger of the court. From the magistrate's court there is an appeal to the Local and Provincial Divisions in civil and criminal cases, on the law and facts, and the superior courts have the power to review the proceedings of all inferior courts, including licensing and assessment courts.

The High Court of Southern Rhodesia consists of two judges, one at Salisbury and the other at Bulwayo, each with concurrent jurisdiction. The suitor has the choice of forum. One of these judges travels on circuit twice a year. The Supreme Court of South Africa consists of the Appellate Division and the Local and Provincial Divisions. The Cape Provincial Division (formerly the Supreme Court of the Cape of Good Hope) sits at Cape Town, and has an original and appellate

jurisdiction over the Cape Province. At present there are five judges of this Division, who sit either as single-judge courts or as three-judge courts. In the Cape Province there are also the Eastern Districts Local Division (formerly the Eastern Districts Court) at Grahamstown, which consists of three judges who may sit as single-judge or three-judge courts; and the Griqualand West Local Division (formerly the High Court of Griqualand) which at present has one judge at Kimberly. The Natal Provincial Division, at Maritzburg, consists of three judges. There is also a single-judge court which sits at Durban, Natal, and is called a Circuit Court. The Orange Free State Provincial Division, at Bloemfontein, consists of three judges. In the Transvaal Provincial Division (formerly Transvaal Supreme Court), at Pretoria, there are five judges. This court sits as a three-judge court. The Witwatersrand Local Division (formerly Transvaal High Court) at Johannesburg, Transvaal, is a one-judge court.

One of the judges of each Provincial Division is known as the Judge President, and, except in appeals from a Local Division or a single-judge court when three judges must sit, any two judges of a division form a quorum. In appeals from magistrates' courts to the Provincial Divisions, as a rule at least two judges sit together. The various Provincial and Local Divisions and the High Court of Southern Rhodesia have jurisdiction over all persons residing and being in their respective areas and all causes whatsoever, including cases in which the government is a party and those in which the validity of a statute is called in question. Where a cause arises or a person resides in the area of a Local Division, the action may be in either the Provincial or Local Division at the option of the plaintiff, and a case which has been commenced in one court may be removed to another court which has jurisdiction. Twice a year single-judges from most of the centres travel on circuit and have all the powers of a Provincial or Local Division of the Supreme Court, civil and criminal, within the area of the circuit districts which are fixed by the Governor-General.

This same official appoints and removes the judges of the Supreme Court of the Union. Judicial appointments in the Union cease when the judge reaches the age of seventy-five years (except in the case of judges appointed before the Union who are appointed for life). The salaries of judges are fixed by Parliament. An elaborate pension scheme allows of the retirement of judges at the age of sixty-five years after ten years service. The Governor-General has power to remove judges of the Union on an address from both Houses of Parliament in the same session praying for such removal on the ground of his behavior or incapacity. The term Governor-General here means Governor-General-in-Council, *i. e.*, the Cabinet. In Southern Rhodesia appointments are made by the Administrator.

Opinion in South Africa is divided as to whether the superior courts of original jurisdiction should sit as single judges or as three-judge courts. The practice varies in the different provinces of the Union as it did before the Union. As trial by jury in some provinces is rare and means additional expense and probably less satisfaction to all concerned, the old practice of two or three judges sitting together commends itself to the lay and legal mind. There are not a few who would extend this practice to criminal matters, especially in cases in which aboriginal natives and colored persons (who do not sit on juries) are concerned. In Southern Rhodesia there is a special jury panel for the trial of cases of assaults by natives on white women. In all the courts, except in certain criminal cases concerning children in the Union, all trials must take place in open court and evidence must be given *viva voce*.

Criminal Jurisdiction.

The foundation of the procedure in criminal cases was laid by a Scottish judge, specially appointed for that purpose as a judge of the Cape Colony early in the nineteenth century. The summary jurisdiction of magistrates is limited as to the amount of punishment. This does not, as a rule, exceed a fine of ten pounds or imprisonment for three months, and on second conviction, thirty-six lashes. In some remote parts where there is

no magistracy, the work of the magistrate is done by a special justice of the peace who has similar powers, though somewhat limited. The magistrate, in some of the provinces and colonies holds inquests in the case of fires and murder, and forward the papers to the Attorney-General, who may take action, if so advised. In serious crimes or where the magistrate in the course of a summary trial considers the offence to be of a serious nature, a preparatory (or preliminary) examination is taken by the magistrate who either discharges the accused or commits him for trial. He sends the depositions to the Attorney-General or Solicitor-General of the Province who is a permanent Union official.

The Attorney-General who has also the power of originating or taking up prosecutions at any stage before a final acquittal, if he decides to prosecute, remits the case to the magistrate who after hearing all the evidence has the power of final acquittal or conviction. The magistrate in remitted cases has power by statute to pass a sentence not exceeding two years, or a fine of one hundred pounds or thirty-six lashes. If the Attorney-General, on reading the depositions, decides that the case is one which ought to be tried by a judge or jury, he indicts and prosecutes either in person or by deputy at the criminal sessions or circuit court. The right of trial by jury is in the discretion of the Attorney-General in all provinces except Natal, where a prisoner in a remitted case has the right to insist upon being tried by a judge and jury. The Attorney-General cannot remit a case in which the only punishment is death or, in Natal, in cases of murder, rape or treason (which are punishable by death in all parts of South Africa). A jury consists of nine men. The prisoner has the right of three peremptory challenges, and any number for cause shown, but challenges are rarely exercised.

The ordinary mode of prosecution is at the instance of the Crown, through the Attorney-General in the superior courts, and through the police in the inferior courts. A private person may prosecute if he is able to show that he has suffered some injury in consequence of the commission of the offence. If he prosecutes in a superior court, he must produce a *nolle prosequi*

from the Attorney-General, and enter into a recognizance to proceed to the final determination of the trial. The Attorney-General may take up the prosecution of such a case at any stage of the proceedings. Private prosecutions, however, are practically unknown.

In the conduct of civil and criminal trials the procedure and practice is very similar to that of England, and rules of court are made from time to time by the whole body of judges, regulating the procedure and practice in the various courts. The English and Dutch language are on an equal footing, though in the large preponderance of cases the English language is the forensic medium.

The general machinery of justice in the Union is under the supervision of the Minister of Justice, who is a member of the Cabinet. The practitioners in the inferior courts are generally attorneys and law agents, although advocates (barristers) have the right of audience. In the superior courts advocates alone have the right of audience on behalf of a client, instructed by an attorney as in England. Women are not allowed to practice as advocates, attorneys, notaries or conveyancers. The fees of all practitioners, save where a specific agreement is made, are subject to detailed taxation by an official. There is an extensive system of *in forma pauperis* practice. In criminal cases, wherever death is a penalty, the judge has the power of assigning counsel who defends *pro deo* for a nominal fee paid by the Crown. In civil cases in which either of the parties does not possess more than ten pounds, if an advocate certifies that there is *probabilis causa,* the court, on application, assigns as advocate and attorney, who give their services gratuitously.

The judges are appointed from the members of the Bar. Both the magistrates and the judges have always been distinguished for that impartiality and independence which is characteristic of the British administration of justice. The extra remuneration of judges who are appointed on non-judicial commissions was forbidden by the Cape Charter of Justice, but statutory provision has since been made for such remuneration. There is too great a tendency to appoint judges on such commis-

sions, but this may be due to the fact that it is not easy to obtain impartial men for such work, and is in itself a tribute to their impartiality.

In a country like South Africa where legislation is slow, and not always in the direction of progress, the task of improving the substantive and adjective law devolves largely upon the judiciary. It is to their excellent work, and principally to the long and untiring efforts of the present Chief Justice, Lord De Villiers, that the law and practice of the Roman-Dutch system in the various parts of South Africa has been evolved into a comparatively uniform and efficient organ for the even distribution of justice according to the needs of modern society. Codification, which must come, is all that is required to complete the fabric.

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